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No. 00-189

Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA
and COEUR D'ALENE TRIBE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN REPLY

The State of Idaho replies to the arguments raised in the Briefs of the United States and the Coeur d'Alene Tribe in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ARGUMENT IN REPLY

1. The United States and the Coeur d'Alene Tribe allege that the court of appeals simply resolved a fact-specific dispute that does not warrant this Court's review. Of course the dispute was fact-specific: all disputes are. The State's petition, however, does not raise factual issues; rather, it questions the court of appeals' reformulation of the legal standards used to infer congressional intent to deny a state's sovereign rights to submerged lands. By holding that state title to submerged lands within an executive order Indian reservation is defeated whenever Congress "recognizes" such a reservation, the court has dramatically eased the standards required for finding such a defeat, thus departing from the traditional "strong presumption against conveyance [of submerged lands] by the United States" to Indian tribes. *Montana v. United States*, 450 U.S. 544, 552 (1981).

The Tribe and the United States argue that the court of appeals' relaxation of the legal standards protecting state ownership of submerged lands was justified by this Court's decision in *United States v. Alaska*, 521 U.S. 1 (1997), which held that Congress may express an intent to defeat state title to submerged lands by recognizing, in a statehood act, pre-existing reservations of submerged lands originally reserved by executive order.

The *Alaska* decision, however, did not modify the standards that this Court has established for resolving whether Congress has conveyed permanent title of submerged lands to Indian tribes. Indian reservations have a

unique status in the law. Unlike other federal reservations, where the federal government holds unrestricted fee title, federal title to lands within Indian reservations must be viewed in conjunction with the property rights of the occupant tribe. To get a complete picture of the title within an executive order Indian reservation, one must examine both the rights held by the United States, and the rights granted to the tribe as a result of the executive order.

Thus, unlike the situation in *Alaska*, where the Court addressed rights reserved by the United States to itself, the primary task with regard to issues of title within an Indian reservation is to determine what rights have been vested in the Tribe as a result of executive and congressional actions. It is well-established that an executive order does not convey permanent title to the occupant tribe. *See Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949) ("[a]n Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President"). This was certainly the understanding of Congress at the time it enacted the 1889 Act that authorized negotiations for the cession of a portion of the Coeur d'Alene Reservation. Act of March 2, 1889, 25 Stat. 980, 1002. Senate reports studying this issue concluded that, within executive order reservations, " 'the Indians were given a license to occupy the lands described in [the executive order] so long as it was the pleasure of the Government that they should do so, and no right, title, or claim to such lands had vested in the Indians by virtue of this occupancy.' " *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 328 (1942), *quoting* S. Rep. No. 664, 52d Cong., 1st Sess. 2 (1892).

In short, tribes possess only temporary rights of possession to lands reserved by executive order; congressional action is required to vest tribes with permanent

rights in such lands. This Court has held that "the Constitution places the authority to dispose of public lands exclusively in Congress. . . . " *Sioux Tribe*, 316 U.S. at 326; *see also Karuk Tribe v. Ammon*, 209 F.3d 1366, 1373 (Fed. Cir. 2000) ("only an Act of Congress can grant a right of permanent occupancy as opposed to permissive occupancy").-Thus, within an executive order Indian reservation, permanent property interests are conveyed to the occupant tribe only where Congress has delegated such authority to the President, *Sioux Tribe*, 316 U.S. at 326, or where Congress ratifies the executive order with a "purpose to transform the Executive Order into a conveyance of something more than a mere temporary and cancellable possessory right to the Indians." *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 178 (1947). Moreover, "[a]n Act granting permanent, rather than permissive, occupancy, must expressly create those rights." *Karuk Tribe*, 209 F.3d at 1374.

The Tribe and the United States, as well as the court of appeals, simply ignore the body of law defining the rights that may pass to a tribe as the result of an executive order. Indeed, the court of appeals made the unwarranted assumption that Congress did not need to expressly confer title upon the Tribe, because, in its view, beneficial ownership of submerged lands had already passed to the Tribe as a result of the 1873 Executive Order. Pet. App. 15-16. This fundamental departure from this Court's precedents permeates the opinion. For example, the court of appeals stated that Congress' authorization of "negotiations in 1889 to purchase and thereby recover whatever portion of those lands the Tribe was willing to sell demonstrates its acknowledgment that beneficial ownership of the lands had passed to the Tribe." Pet. App. 21. The court later concluded that:

> The affirmative course of action on which Congress embarked in 1889 – open-ended negotiations to purchase whatever non-agricultural

> land, particularly submerged lands, the Tribe was willing to cede – presupposes that beneficial ownership of all land within the 1873 reservation, including submerged lands, had already passed to the Tribe."

Pet. App. 23.

In short, the core of the court of appeals' holding ignores the settled law of this Court, which holds that executive orders cannot convey beneficial ownership of reservation lands to Indian tribes. By ignoring this core principle, the court of appeals improperly focused its efforts on determining whether Congress "recognized" the reservation, instead of asking, as it must under *Confederated Bands of Ute Indians* and other cases, whether Congress affirmatively intended to transform the Tribe's temporary right of permissive occupancy into permanent title.

No fair reading of the 1889 Act can lead to the conclusion that Congress acted with affirmative intent to transform the temporary rights of possession the Tribe held pursuant to the executive order into permanent rights of title. By its terms, the 1889 Act did not convey any title or other rights to the Tribe. Nor is there any evidence that Congress, by authorizing negotiations, intended to authorize the executive branch to convey any title to the Lake, since such authorization would have to be explicit. *See Hynes*, 337 U.S. at 104 ("When Congress intends to delegate power to turn over lands to the Indians permanently, one would expect to and doubtless would find definite indications of such a purpose"). Indeed, the language of the 1889 Act, when viewed in conjunction with the 1886 Act, makes it clear that Congress was reserving to itself the right to decide whether or not the Tribe's rights to the reservation would be made permanent. *See* Act of May 15, 1886, 24 Stat. 29, 44 ("no agreement made shall take effect until ratified by Congress"); Act of March 2, 1889, 25 Stat. 980, 1002 ("which

purchase shall not be complete until ratified by Congress").

Congress, by reserving to itself the right to ratify any agreement resulting from the negotiations, was acting in accordance with its established policy. As the Tribe notes, following the 1871 statute that forbade further treaties with Indian tribes, ratification by both houses of Congress was "simply the normal practice of the day replacing the requirement of Senate treaty ratification." Brief in Opposition of Respondent Coeur d'Alene Tribe at 13. This course of conduct established a general policy requiring explicit congressional approval before any permanent title, beneficial or otherwise, passed to the Tribe. The United States and the Tribe have offered no explanation as to why Congress would have departed from this policy with regard to the Coeur d'Alene Reservation. Absent such an explanation, the court of appeals' decision holding that Congress conferred permanent title upon the Tribe by simply authorizing negotiations is in clear conflict with the decisions of this Court.

2. Even if one ignores the fundamental difference between Indian reservations and other federal reservations, there is still no basis for the assertions that the court of appeals correctly extended the decision in *Alaska* to the congressional acts at issue here. *Alaska* stands only for the proposition that congressional recognition of executive order reservations may defeat state title to submerged lands, when such recognition is embodied in a statehood act that specifically addresses the allocation of such lands between the state and federal governments, and then only when it is clear that defeat of state title is necessary to fulfill the purposes or objectives of the reservation.[1]

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[1] In *Alaska*, the Court, in examining its previous submerged lands decisions, concluded that "in each case, we focused on the

The court of appeals, however, extended the holding in *Alaska* to a pre-statehood congressional action that did not specifically address the allocation of sovereignty and title between state and federal governments. In doing so, it departed completely from this Court's decisions addressing the level of specificity necessary to find a defeat of state title in a pre-statehood congressional action. In addressing alleged conveyances of submerged lands to Indian tribes, this court has always emphasized that such a conveyance must be " 'definitely declared or otherwise made plain,' " or "rendered 'in clear and especial words.' " *Montana*, 450 U.S. at 552, *quoting United States v. Holt State Bank*, 270 U.S. 49, 55 (1926), and *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 411 (1842). Pre-statehood reservations are held to defeat state title only where the United States can "establish that Congress affirmatively intended to defeat the future State's title to such land." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 202 (1987). In other words, before pre-statehood actions are held to defeat state title to submerged lands, it must be demonstrated that Congress specifically contemplated the effect of its actions on future state title.

By applying the "recognition test" used in *Alaska* to pre-statehood actions, the court of appeals bypassed this important threshold test requiring concrete evidence that Congress contemplated the effect of its actions on future state title. The "recognition test" could be employed in *Alaska* only because one of the purposes of the Alaska

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purpose of the conveyance or reservation as a critical factor in determining federal intent." 521 U.S. at 52. In concluding that the United States retained title to submerged lands within the reservations reviewed in *Alaska*, the Court concluded that "defeating state title to submerged lands was necessary to achieve the United States' objective," *id.* at 42, or that "retention of lands underlying those waters was critical to the Government's goal. . . . " *Id.* at 52.

statehood act was to examine the lands held in federal ownership and make determinations as to which lands would pass to the State and which would be retained in permanent federal ownership. *Alaska*, 521 U.S. at 55. Thus, it was clear from the context of the act that Congress contemplated the effect of its action on state ownership of submerged lands within the reservations being addressed. *Id.* at 57 ("Congress clearly contemplated continued federal ownership of certain submerged lands").

Here, however, the context of the act does not suggest that Congress contemplated the effect of its actions on future state title. By applying the *Alaska* "recognition test" to a pre-statehood action, the court of appeals created a conflict requiring review by this Court.

3. In *Alaska*, the Court held that the purpose of a reservation is a "critical factor" in determining whether Congress intended to defeat state title. 521 U.S. at 52. A defeat of state title to submerged lands should be inferred only where such defeat is necessary to fulfill the purposes for which the land was reserved. *Id.* at 42-43. The court of appeals rejected purpose as a critical factor, stating that it is not "require[d] that Congress apprehend the purpose of the reservation at the time it takes action recognizing the executive reservation." Pet. App. 18 n.11. It also stated that Congress' understanding in 1889 regarding the Tribe's conversion to an agricultural lifestyle was "irrelevant," since the Tribe had been dependent upon fishing when the reservation was originally created in 1873. Pet. App. 19.

The United States and the Tribe attempt to explain away the court of appeals' rejection of purpose as a critical factor by suggesting that "inclusion of the submerged lands in the Reservation was necessary to accomplishing the United States' purposes here because it was part of the consideration demanded by the Tribe in exchange for acceding to the United States' other goals."

Brief in Opposition of Respondent Coeur d'Alene Tribe at 3 n.1; Brief for the United States in Opposition at 21.

This argument subverts the principle that submerged lands are held in a solemn trust for the benefit of future states. *Montana*, 450 U.S. at 551. The United States is not free to use submerged lands as bargaining chips for the accomplishment of other objectives. It may defeat state title to submerged lands only when continued federal ownership of the submerged lands is necessary to accomplish a purpose which requires continued federal ownership of the submerged lands.[2] The court of appeals, by failing to make this critical determination, departed from this Court's submerged lands decisions, in essence creating a new rule in which there is no need to determine whether congressional purposes require the defeat of state title. This clear-cut conflict with this Court's decisions requires review.[3]

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[2] *See Alaska*, 521 U.S. at 42 (finding that federal ownership of submerged lands was necessary to purpose of preserving petroleum reserves); *id.* at 55 (finding that federal ownership of submerged lands was necessary to purpose of preserving wildlife habitat); *id.* at 52 (noting that prior decisions had rejected tribal claims of ownership of submerged lands where tribe was not dependent upon fishing for its subsistence).

[3] The Tribe's argument that Congress intended to retain the submerged lands because such retention was necessary to meet tribal demands also fails as a factual matter, since Congress, in authorizing negotiations, could not have known that the Tribe would demand retention of a portion of the Lake as consideration for its cession of other portions of the Reservation. Congress authorized the negotiations on March 2, 1889; the negotiations took place in August and September of that same year. Act of March 2, 1889, 25 Stat. 980, 1002; Pet. App. 74. Thus, if any demands took place (a fact far from clear from the negotiation transcripts), they took place five months after the congressional action alleged to defeat state title.

4. Both the United States and the Tribe assert that a further reason for denying the petition for certiorari is the presence of language in the Idaho Constitution disclaiming title to lands "owned or held" by Indian tribes. Idaho Const., Art. XXI, § 19. Such an argument raises issues not presented in the petition for certiorari, since the court of appeals did not reach the issue of whether Congress' approval of the disclaimer language[4] would divest the State of title to the disputed submerged lands. Further, any reliance on the disclaimer clause of the Idaho Constitution simply begs the question: certainly, the clause recognizes and respects tribal title to Indian lands, but unless Congress took affirmative steps to convey the submerged lands to the Tribe prior to statehood, the submerged lands were not "Indian lands," but were held in trust for the future state.

5. It is fitting that this Court resolve disputes between a state and the United States regarding fundamental aspects of state sovereignty. *United States v. Texas*, 143 U.S. 621, 643 (1892). This Court has traditionally granted certiorari in cases involving competing federal and state claims to submerged lands, even in the apparent absence of conflicting decisions by lower courts. *See, e.g., Utah Division of State Lands*, 482 U.S. at 200; *Montana*

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[4] Unlike other western states, Idaho's state constitution was not the result of an enabling act, which typically contained provisions requiring a disclaimer to federal and Indian lands as a condition of statehood. *See, e.g.*, Enabling Act of Feb. 22, 1889, § 4, 25 Stat. 677 (North Dakota, South Dakota, Montana and Washington). Rather, the disclaimer language in the Idaho Constitution originated with the drafters of the state constitution, not with Congress. Neither the United States nor the Tribe have offered any evidence indicating that the drafters of the Idaho Constitution understood themselves to be disclaiming title to submerged lands to which the State would otherwise have been entitled absent such a disclaimer.

v. United States, 450 U.S. at 547. The same is true of competing tribal and state claims. *See, e.g., Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). The United States and the Tribe have given no reasons requiring a departure from this tradition.

6. The Tribe raises a number of fact-specific issues that were not addressed by the court of appeals, including the unfounded allegation that submerged lands have no special place in Idaho history, Brief in Opposition of Respondent Coeur d'Alene Tribe at 18, and the inferences that the Tribe asserts should be made from a patent granted to Frederick Post (that contained submerged lands both inside and *outside* the reservation boundary), *id.* at 10. Although the State disagrees with these factual allegations, they are not discussed herein, since they were not considered by the court of appeals and have no bearing on the issue of whether the petition for certiorari should be granted.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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